1988

Timpanogos Village v. Dennis McDonald d/b/a Mac Builders : Brief of Appellant

Utah Court of Appeals

Gary H. Weight; Aldrich, Nelson, Weight & Esplin; Attorney for Appellant.
Taylor D. Carr; Attorney for Respondent.

IN THE UTAH COURT OF APPEALS

TIMPANOGOS VILLAGE, Plaintiff-Respondent, vs. DENNIS McDONALD d/b/a MAC BUILDERS, Defendant-Appellant.	:	Case No. 880111-CA Category No. 14 B

BRIEF OF APPELLANT

APPEAL FROM THE FOURTH CIRCUIT COURT OF UTAH COUNTY,
STATE OF UTAH, JUDGE JOSEPH DIMICK

TAYLOR D. CARR
350 South 400 East, Suite 114
Salt Lake City, UT 84111

Attorney for Respondent

GARY H. WEIGHT
ALDRICH, NELSON, WEIGHT & ESPLIN
43 East 200 North
P.O. Box "L"
Provo, UT 84603-0200

Attorney for Appellant

IN THE UTAH COURT OF APPEALS

TIMPANOGOS VILLAGE, Plaintiff-Respondent, vs. DENNIS McDONALD d/b/a MAC BUILDERS, Defendant-Appellant.	:	Case No. 880111-CA Category No. 14 B

BRIEF OF APPELLANT

APPEAL FROM THE FOURTH CIRCUIT COURT OF UTAH COUNTY,
STATE OF UTAH, JUDGE JOSEPH DIMICK

TAYLOR D. CARR
350 South 400 East, Suite 114
Salt Lake City, UT 84111

Attorney for Respondent

GARY H. WEIGHT
ALDRICH, NELSON, WEIGHT & ESPLIN
43 East 200 North
P.O. Box "L"
Provo, UT 84603-0200

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

CASES

IN THE UTAH COURT OF APPEALS

TIMPANOGOS VILLAGE, Plaintiff-Respondent, vs. DENNIS McDONALD d/b/a MAC BUILDERS, Defendant-Appellant.	:	Case No. 880111-CA Category No. 14 B

STATEMENT OF ISSUES PRESENTED ON APPEAL

The issues presented on appeal are as follows:

(1) That the trial court abused its discretion in denying the Defendant's Motion to Set Aside Default Judgment.

(2) Should this court under principles of equity set aside the default judgment to relieve Defendant from an unjust judgment and allow Defendant to present a meritorious defense.

STATEMENT OF FACTS

Plaintiff filed its Complaint dated September 19, 1987, alleging negligent installation by the Defendant of a water line in property of the Plaintiff. The water line was installed by the Defendant pursuant to a remodeling contract entered into between the Defendant, DENNIS McDONALD, and Merrill Bateman, owner of the Timpanogos Village Medical Associates Building located at 560 South State, Suite E-1, Orem, Utah. During the course of remodeling, a special request was made by Dr. West,

occupant of a suite in the Timpanogos Village Medical Associates Building, to install a one-quarter inch copper line from below a sink in a small half bath, up through a wall, through the ceiling and down into a office area, for the purpose of allowing an eventual hook-up of a refrigerator with an ice maker. The line was installed, but was not hooked up to a water source. (R. 11 & 16) Defendant advised Dr. West and the owners of the building (Plaintiff) that before the water line was hooked up to a water source, additional insulation would need to be installed in the ceiling of the building to insulate the copper line from freezing during the winter months. (R. 16) Defendant was not required or requested to insulate the copper line. Defendant's work was completed and his remodeling contract discharged. Eventually the water line was connected to the water source by some person unknown to or unrelated to the Defendant or his business. (R. 16). Due to freezing conditions over the winter months of 1986, the water line ruptured and caused water damage to the Plaintiff's building. (R. 16) Defendant was asked to repair the water damage and also participated in an investigation by Farm Bureau Insurance Exchange to determine the cause of the water damage. The cost of repairing the damage was paid by Farm Bureau Insurance Exchange. Approximately twenty (20) months later, Plaintiff, TIMPANOGOS VILLAGE, initiated the present action to recover from the Defendant the sum equal to the value of the damages to the building. Defendant, DENNIS McDONALD, did not answer the Complaint of the Plaintiff nor did the Defendant,

McDONALD, seek employment or services of counsel until after default judgment. Defendant called counsel for Plaintiff during the 20-day period before an answer was due, to find out what the suit was about. Defendant again communicated with Plaintiff's counsel on the day that default judgment was entered. Defendant had an extensive discussion with Plaintiff's counsel on the day default was entered and was not given to understand that a default judgment had been entered or would be, nor that he should take any further action to avoid judgment. Defendant's next notice of any action in the case was service upon him of a motion in supplemental proceedings. (R. 17) Defendant, McDONALD, is not trained in the law, has not required the services of counsel in the past for any purpose, and is not schooled in the rules of civil procedure. (R. 17)

SUMMARY OF ARGUMENT

Based upon principles of law and equity which have been set forth by the Utah Appellate Courts, it is apparent that the trial judge in this matter abused his discretion in failing to set aside a default judgment entered against Defendant, DENNIS McDONALD. Plaintiff, TIMPANOGOS VILLAGE, is not the real party in interest and Rule 17 of the Utah Rules of Civil Procedure requires that every action shall be prosecuted in the name of the real party in interest. Plaintiff, TIMPANOGOS VILLAGE, was paid once by Farm Bureau Insurance Exchange for the damages claimed to have been caused by a ruptured water line. Plaintiff, TIMPANOGOS VILLAGE, should not be allowed to collect again or receive

judgment for damages already once claimed and paid.

Default was entered October 23, 1987, and default judgment was entered October 27, 1987. (R. 5 & 6) Defendant's Motion to Set Aside Default Judgment was filed December 10, 1987. (R. 10) The Court's Minute Entry denying Defendant's Motion to Set Aside Default Judgment was made January 19, 1988. (R. 30)

ARGUMENT

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT

The Utah Supreme Court has set forth the principles of equity and law pertaining to setting aside default judgments under Rule 60(b) of the Utah Rules of Civil Procedure in the case of Katz vs. Pierce, 732 P.2d 92 (Utah 1988). In that case the court stated:

> The District Court Judge is vested with considerable discretion under Rule 60(b) in granting or denying a motion to set aside a judgment....(cases cited)...The court should be generally indulgent toward setting a judgment aside where there is reasonable justification or excuse for the defendant's failure to answer and when timely application is made. Where there is doubt about whether a default should be set aside, that doubt should be resolved in favor of doing so.

The principles announced in Katz were applied in a prior Supreme Court case titled May vs. Thompson, 677 P.2d 1109 (Utah 1984). In the May case, the plaintiff served a summons on the defendant and filed the Complaint with the clerk of the court on the 10th day after service of the Summons but did not deposit a copy of the Complaint with the clerk. There was irregularity concerning service of the Summons and Complaint on the defendant,

and there was evidence that the defendant did not have counsel until after judgment. His sole advisor prior to judgment was the insurance adjuster who had negotiated for settlement with the plaintiff. After default was entered against the defendant, he employed legal counsel and timely filed a motion to vacate the default judgment. The defendant was 18 years old. The court found that the technical procedure incident to the case, the contradictions engendered in the service of process, inconsistent returns, failure to deposit a copy of the Complaint with the clerk of court, the controverted mailing of a copy of the Complaint, efforts to reach a pre-litigation settlement, the immediacy in seeking relief from default, and defendant's reliance on guidance by the insurance adjuster, all suggested justice in granting relief from a default. The court reaching a conclusion to set aside the default judgment stated:

> We are not unmindful of the principle of reserving determination of a motion to vacate to the sound discretion of the trial court. On appeal, we should not reverse the trial court's determination unless it is arbitrary, capricious or not based on adequate findings of fact or on the law. We are aware also of a principle that if default is issued when a party genuinely is mistaken to a point where, absent such mistake, default would not have occurred, the equity side of the court would grant relief.

The Utah Supreme Court in the case of Helgesen vs. Inyangumia, 636 P.2d 1097 (Utah 1981) set aside a default judgment against the defendant in a case with facts similar to the case at hand. In the Helgesen case, plaintiff was injured in rear-end collisions occurring October 12, 1978, and April 15, 1979, respectively. Plaintiff's counsel had negotiated with

defendant's insurance adjuster for approximately five months. Settlement was not reached and counsel for the plaintiff sent copies of the Complaints he had prepared to the insurance adjuster on November 12, 1979, with a letter advising the adjuster that settlement would remain open for the 20-day period for answering the respective Complaints. Defendant was served with Summons November 24, 1979, and did not answer the Complaint. Judgement by default was entered against the defendant and on January 3, 1980, notice of the entry of the judgment was sent to the defendant. On January 11, 1980, a Motion to Set Aside Default Judgment was filed. The Motion to Set Aside Default Judgment was denied. The Motion to Set Aside Default Judgment was supported by an affidavit of the insurance adjuster who stated that he had the erroneous belief that he had additional time to answer the Complaint based upon his understanding that plaintiff's counsel would send additional medical information to the adjuster so he could properly evaluate the claim. Additional medical information was not sent. Also, the adjuster declared in his affidavit that he believed, through a conversation with plaintiff's counsel, that there would be an extension of time to file the answer. The Utah Supreme Court set aside the default judgment and stated in its opinion the following:

> ...It is quite uniformly regarded as an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification or excuse for the defendant's failure to appear, and timely application is made to set it aside.

Helgesen's counsel argued that since Allstate was in the

insurance business and experienced in litigation, its adjuster was unexcusably negligent in the handling of the Complaint. Responding to this argument, the court stated:

> The plaintiff's attorney and Allstate's adjuster had been in frequent contact with each other for five months negotiating settlement of the two claims. The attorney was well aware that the adjuster and his company contested the amount sought by the plaintiff. With that knowledge, he must have expected that when he filed the law suits, the insurance company would defend them....It is not uncommon in the practice of the law that when parties are negotiating settlement and one party files a law suit to bring pressure to bear, the other party is not strictly held to the time requirements of the rules of procedure since settlement talk continues to the day of trial and few days delay has little or no affect on when the trial date will be set....Under the circumstances the adjuster had every reason to believe that he would be extended professional courtesy by the attorney with whom he was dealing and would hear back from him with further medical information. He was reasonable in believing that no default judgment would be taken in the meantime. We therefore conclude he was not guilty of lack of diligence and the defendant should be relieved of his default under Rule 60(b) on account of the mistake and excusable neglect of the adjuster.

In the instant case, default judgment was taken against Defendant, DENNIS McDONALD, on about October 27, 1987. No notice of the default was given to the Defendant. However, on December 3, 1987, Defendant's wife was served with a Motion for and Order in Supplemental Proceedings. Defendant then filed his Motion to Set Aside Default Judgment on December 10, 1987. In his affidavit supporting the Motion to Set Aside Default Judgment, Defendant stated that he had contact with Plaintiff's counsel on two occasions. One occasion was prior to entry of default judgment and the other occasion was on the day of entry of default judgment. Defendant asserts in his affidavit that he

was not advised that default judgment was entered nor that it would be. He was not advised that he should take any action and he did not seek advice of counsel. Defendant further asserts that he had been instrumental in assisting in the investigation of the cause of damage to Plaintiff's building and had consulted with agents of Farm Bureau Insurance Exchange to determine the cause of the damage. (R. 16) He was aware that a claim by the Plaintiff for the cost of the damage had been paid by Farm Bureau Insurance Exchange. (R. 16) Defendant further asserts that he had contact with Mr. Bateman, owner of TIMPANOGOS VILLAGE, and with agents of Farm Bureau Insurance Exchange after service of the Complaint and Summons upon him. It is reasonable to conclude from the facts and circumstances surrounding Defendant's receipt of a copy of the Complaint and Summons and his actions taken thereafter that he reasonably believed that he was involved in on-going negotiations or investigation pertaining to the claim of the Complaint, and that he did not realize that he should take any action such as answer the Complaint himself or seek advice of counsel. The facts of this case are very similar to the facts of the May and Helgesen cases where the Utah Supreme Court set aside default judgments.

Defendant has further asserted that he has a meritorious defense to the Plaintiff's cause of action. He has asserted in his Affidavit in Support of Motion to Set Aside Default Judgment that he was not the party who connected the copper line to a water source which eventually ruptured when frozen. Defendant

has asserted in his affidavit that he simply installed the line and advised Plaintiff and Plaintiff's tenant that the line would later need to be connected and insulated to avoid breakage. (R. 16)

Defendant further has asserted in his affidavit that Plaintiff, TIMPANOGOS VILLAGE, was paid by Farm Bureau Insurance Exchange for the damage caused by the ruptured water line. The pleadings on file do not indicate that TIMPANOGOS VILLAGE has received an assignment from Farm Bureau Insurance Exchange to assert claims which Farm Bureau Insurance Exchange may have to be reimbursed for the amount expended by them to pay the water damage claim. Thus, Defendant has effectively raised the issue of whether or not Plaintiff is the real party in interest.

The trial judge seems to have ignored the important considerations of law and equity which were raised in Defendant's motion and affidavit. The trial judge simply entered a decision denying the motion of the Defendant to set aside the default judgment without giving any reason or reasons therefor. Defendant respectfully contends that under the facts and circumstances of this case, that his neglect to answer the Complaint was reasonable and excusable and that he does have a meritorious defense to the Complaint of the Plaintiff. Defendant respectfully requests this Court to set aside the default judgment and allow him to answer the Complaint.

POINT II

DEFENDANT HAS A MERITORIOUS DEFENSE AGAINST THE CLAIMS OF THE PLAINTIFF, AND THIS COURT UNDER EQUITABLE PRINCIPLES SHOULD RELIEVE DEFENDANT FROM AN UNJUST JUDGMENT

(a) PLAINTIFF, TIMPANOGOS VILLAGE, IS NOT THE REAL PARTY IN INTEREST

Rule 17 of the Utah Rules of Civil Procedure provides in pertinent part as follows:

> Every action shall be prosecuted in the name of the real party in interest....No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection or ratification of commencement of the action by, or joinder or substitution of, the real party in interest;...

The Utah Supreme Court in the case of Kemp vs. Murray, 680 P.2d 758 (Utah 1984) set forth the purpose and protection afforded by Rule 17(a) of the Utah Rules of Civil Procedure. Citing an earlier case, Shaw vs. Jeppson, 239 P.2d 745 (1952), the Supreme Court in Kemp stated:

> The reason the defendant has the right to have a cause of action prosecuted by the real party in interest is so that the judgment will preclude any action on the same demand by another and permit the defendant to assert all defenses or counterclaims available against the real owner of the cause.

In his affidavit supporting the Motion to Set Aside Default Judgment, the Defendant, DENNIS McDONALD, stated that he participated in an investigation with Farm Bureau Insurance Exchange to determine the cause of water damage to Plaintiff's building. He further stated that he was aware that the claim was eventually settled and paid to the Plaintiff by Farm Bureau Insurance Exchange. The Defendant, himself, was the recipient of

payment made by Farm Bureau Insurance Exchange since Defendant had done the repair work necessitated by the water damage. The facts stated in the Defendant's affidavit are not controverted by the Plaintiff in his response to Defendant's Motion to Set Aside Default Judgment. (R. 19-27) Plaintiff has not alleged in its Complaint that it is an assignee of the cause of action of Farm Bureau Insurance Exchange. Obviously if Plaintiff has been reimbursed for the damage caused to its building by water damage, then it is inequitable and unconscionable for Plaintiff to be awarded judgment for the same claim. The real party in interest appears to be Farm Bureau Insurance Exchange but same is not named as a party plaintiff. However, Farm Bureau Insurance Exchange could presently bring an action on its own claim (subrogation) against the Defendant, DENNIS McDONALD. Allowing separate claims by the Plaintiff herein and Farm Bureau Insurance Exchange would bring a result intolerable in the law. Thus, the default judgment should be set aside and the Plaintiff should be required to amend its Complaint to set forth the real party in interest or to allege an assignment from Farm Bureau Insurance Exchange.

(b) PLAINTIFF SHOULD BE PROHIBITED FROM COLLECTING TWICE FOR A SINGLE CLAIM FOR DAMAGES

Defendant has asserted in his affidavit supporting his Motion to Set Aside Default Judgment that he installed a water line at the request of the Plaintiff and the Plaintiff's tenant, Dr. West. (R. 16) Defendant further asserted in his affidavit that he did not connect the water line to a water source and that

there was inadequate insulation in the attic of the building where the water line was exposed to protect the line from freezing in the winter. Defendant further asserted that at some time after the installation of the water line, it was connected to a water source and apparently done so without adequately insulating the line as it passed through the ceiling. Defendant further has asserted that due to winter cold, which apparently penetrated the attic of the Plaintiff's building, that the water in the line froze and caused the line to burst in the attic area resulting in damage to the premises. If the assertions of the Defendant are proven at trial, then the trier of fact would likely conclude that the Defendant is not liable to the Plaintiff. The Plaintiff would likely discover that a separate party is or ought to be liable for the water damage. Conceivably, the trier of fact could find that the Plaintiff's own negligence in failing to insulate the water line when it was connected to a water source or prior thereto is the sole or major contributing cause of the ruptured line and consequent water damage. Defendant contends that based upon principles of equity herein discussed, that he has presented and does present a meritorious defense, and that when coupled with his reasonable and excusable neglect, the judgment should be set aside, the Defendant allowed to answer and assert his defenses including a motion to determine the real party in interest.

CONCLUSION

Due to reasonable and excusable neglect, Defendant, DENNIS

McDONALD, failed to answer the Complaint of the Plaintiff. Default Judgment was entered October 27, 1987, and Defendant filed a Motion to Set Aside Default Judgment December 10, 1987. Defendant took timely action to pursue setting aside the Default Judgment. The Defendant's participation in investigation of damage caused to Plaintiff's building, the Defendant's personal knowledge that the claim for the damage had been paid by an insurance company, and the Defendant's conversations with counsel, Merrill Bateman and agents of the insurance company, which caused him to believe that no adverse consequence would result from his failure to act, give rise to circumstances very similar to the circumstances and facts in the May and Helgesen cases. In May and Helgesen, the Supreme Court found a basis in law and equity to set aside a default judgment.

The Defendant successfully raised in the Motion to Set Aside Default Judgment issues pertaining to whether or not the Plaintiff was the real party in interest. Defendant has successfully demonstrated that he has a meritorious defense to the claims of the Plaintiff. His defenses include the following possibilities: Defendant, DENNIS McDONALD, is not liable to the Plaintiff; the negligence of a third party caused the damage; Plaintiff's own negligence is the major contributing factor to the damage. Based upon the foregoing, Defendant contends that the trial judge abused his discretion when he denied Defendant's Motion to Set Aside Default Judgment. Defendant respectfully requests that this Court enter an order remanding this case and

directing the court to set aside the default judgment and allow the Defendant to file his answer and other pleadings in the case.

RESPECTFULLY SUBMITTED this 9th day of June, 1988.

Gary H. Weight

GARY H. WEIGHT
Attorney for Defendant-Appellant

CERTIFICATE OF DELIVERY

I hereby certify that I delivered a true and exact copy of the foregoing instrument to Mr. Taylor D. Carr, Attorney for Plaintiff, at 350 South 400 East, Suite 114, Salt Lake City, UT 84111 this 13 day of June, 1988.

Gary H. Weight

ADDENDUM

TAYLOR D. CARR
Attorney for Plaintiff
350 South 400 East, Suite 114
Salt Lake City, Utah 84111
Telephone: (801) 363-0888

IN THE CIRCUIT COURT, STATE OF UTAH

UTAH COUNTY, PROVO DEPARTMENT

TIMPANOGAS VILLAGE, Plaintiff, vs. DENNIS McDONALD dba MAC BUILDERS Defendant.	COMPLAINT Civil No. T730024810V

Plaintiff above named complains of defendant and for cause of action alleges:

1. The amount in controvery is less than $10,000.00 and the damage complained of occurred in Utah County, State of Utah.

2. Prior to the 9th day of February, 1986, Defendant caused to be installed in or near the attic of plaintiff's commercial building located at 560 South State, Orem, Utah, a certain copper water line.

3. Defendant in performing the duties of installation of said water line, did so in a negligent and unworkmanlike manner such that on or about the 9th day of February, 1986, said water line froze and burst causing damage to Plaintiff's building.

4. As a direct and proximate result of the aforesaid

negligent, careless and unworkmanlike conduct on the part of Defendant, Plaintiff was damaged in the sum of $4,029.46.

WHEREFORE, Plaintiff demands judgment against Defendant in the sum of $4,029.46 together with costs incurred herein and such other and further relief as the Court deems just in the premises.

DATED this 19 day of September, 1987.

TAYLOR D. CARR
Attorney for Plaintiff

TAYLOR D. CARR - A0582
Attorney for Plaintiff
350 South 400 East, Suite 114
Salt Lake City, Utah 84111
Telephone: (801) 363-0888

IN THE CIRCUIT COURT, STATE OF UTAH

UTAH COUNTY, PROVO DEPARTMENT

TIMPANOGAS VILLAGE, Plaintiff, vs. DENNIS MCDONALD dba MAC BUILDERS Defendant.	DEFAULT AND DEFAULT JUDGMENT Civil No. 873002481W

DEFAULT

In this action, Defendant above named having been regularly served with Summons and Complaint, and having failed to appear and answer Plaintiff's Complaint, and the time allowed by law for answering having expired, the default of said Defendent is hereby entered according to law.

DATED this 23 day of Oct., 1987.

CLERK OF THE CIRCUIT COURT

BY Judy Talbot

Deputy Clerk

DEFAULT JUDGMENT

The Defendant above named has failed to plead or otherwise defend in this action and default has been entered.

IT IS HEREBY ORDERED that Plaintiff above named be awarded JUDGMENT against the Defendant in the sum of:

$4029.46	Principal,
33.57	Accrued interest to date of Judgment,
57.50	Accrued costs to date of Judgment,
.00	Attorney's fees,
$4120.53	TOTAL JUDGMENT.

With interest on the total judgment at the rate of twelve per cent (12%) per annum as provided by law from the date of this judgment until paid.

DATED and SIGNED this 27 day of Oct, 1987.

BY THE COURT:

CIRCUIT COURT JUDGE ~~OR CLERK OF THE COURT~~

GARY H. WEIGHT (3415)
ALDRICH, NELSON, WEIGHT & ESPLIN
Attorneys for Plaintiff
43 East 200 North
P.O. Box "L"
Provo, UT 84603
Telephone: 373-4912

IN THE EIGHTH CIRCUIT COURT OF UTAH COUNTY

STATE OF UTAH, PROVO DEPARTMENT

TIMPANOGOS VILLAGE, Plaintiff, vs. DENNIS McDONALD d/b/a MAC BUILDERS, Defendant.	MOTION TO SET ASIDE DEFAULT JUDGMENT Case No. 873002481CV

COMES NOW, the Defendant, DENNIS McDONALD d/b/a MAC BUILDERS, by and through counsel, Gary H. Weight of Aldrich, Nelson, Weight & Esplin, and moves the Court pursuant to Rule 60(b) of the Utah Rules of Civil Procedure to set aside that certain judgment entered against the Defendant on October 27, 1987. Said motion is made upon the grounds and for the reasons set forth in sub-paragraph 1, 3 and 7 of Rule 60(b) of the Utah Rules of Civil Procedure. This motion is filed not more than three (3) months after entry of judgment and is based upon the following facts which are set forth here and are support by the Affidavit of the Defendant attached hereto and made a part hereof by this reference.

Defendant, DENNIS McDONALD, was hired in May of 1983 to remodel office space for a Merrill Bateman, owner of Timpanogos Village Medical Associates located at 560 South State, Suite E-1, Orem, Utah. Defendant remodeled a suite which was occupied by Dr. West. During the remodel, Defendant was requested to install a one-quarter inch copper line from below a sink in a small half bath over to an office area so that a refrigerator with an ice maker could be hooked up eventually. The copper line was not connected to a water source and the tenant or owner of the office was advised that before a connection of the copper wire was recommended, additional insulation should be blown into the ceiling of the office building. Eventually, someone other than the Defendant connected the copper line and over the winter it froze and burst and caused water damage which was repaired by Defendant and paid for by Farm Bureau Insurance, the subrogee in this case. Farm Bureau Insurance investigated the claim thoroughly and elected to make a payment for the damages. Now one year and nine months later, Farm Bureau as subrogee or TIMPANOGOS VILLAGE have brought this action in negligence and unworkmanlike conduct. Defendant was served with a Summons on September 28, 1987, and made contact with Plaintiff's attorney and discussed the facts of the case at length with Plaintiff's attorney. Plaintiff's counsel did not advise the Defendant that he was about to take a judgment or that the Defendant would need

to take any further action. Defendant was not contacted by Plaintiff's counsel or by Plaintiff nor did Defendant have any further contact with the case until he was served with the motion in supplemental proceedings.

Based upon the foregoing facts, Defendant believes he has a meritorious defense to the case and does not interpose this motion for delay, but desires to have his day in court and believes that his motion is well founded and that the judgment should be set aside and the Defendant allowed to file his answer and have the matter set down for trial. Defendant respectfully moves the Court to grant his motion.

DATED this 10th ~~day~~ of December, 1987.

Gary H. Weight

GARY H. WEIGHT
Attorney for Defendant

MAILING CERTIFICATE

I hereby certify that I mailed, postage prepaid, a copy of the foregoing instrument to Mr. Taylor D. Carr, Attorney for Plaintiff, at 350 South 400 East, Suite 114, Salt Lake City, UT 84111 this 10th day of December, 1987.

Jennifer Allan

GARY H. WEIGHT (3415)
ALDRICH, NELSON, WEIGHT & ESPLIN
Attorneys for Plaintiff
43 East 200 North
P.O. Box "L"
Provo, UT 84603
Telephone: 373-4912

IN THE EIGHTH CIRCUIT COURT OF UTAH COUNTY

STATE OF UTAH, PROVO DEPARTMENT

TIMPANOGOS VILLAGE, Plaintiff, -vs- DENNIS McDONALD d/b/a MAC BUILDERS, Defendant.	:	AFFIDAVIT IN SUPPORT OF MOTION TO SET ASIDE DEFAULT JUDGMENT Case No. 873002481CV

STATE OF UTAH)
: ss
COUNTY OF UTAH)

I, DENNIS McDONALD, being first duly sworn upon my oath depose and say:

1. That I am the Defendant in the above-entitled case.

2. That I do business under the name of MAC BUILDERS AND REMODELING.

3. That in May of 1983 I was hired by Merrill Bateman, owner of the Timpanogos Village Medical Associates building locate at 560 South State, Suite E-1, Orem, Utah, and Bernard Tanner, representative for Dr. West, to remodel the above mentioned suite.

4. I was requested to remodel a suite for a Dr. West. In the process of remodeling the suite I was requested to install a one-quarter inch copper line from below a sink in a small half bath up through a wall through the ceiling and down into an office area for the purpose of allowing an eventual hookup of a refrigerator with an ice maker. The line was installed in the wall and overhead in the attic and down into the office as requested. The water line was not connected to a water source.

5. I advised the tenant that before the water line was used that additional insulation would need to be installed in the ceilin of the building or there would be a risk of water freezing in the line over the winter months. I advised the owner that the building needed additional insulation.

6. Eventually the water line was connected by some other person unknown to me and due to freezing over the winter months, the line ruptured and caused water damage in the building. I was requested to repair the area and I did so by reinstalling sheetrock, floor coverings and painting the walls.

7. I spoke with adjusters from Farm Bureau Insurance Company who fully investigated into the matter and examined all the facts and circumstances pertaining to the claim made by TIMPANOGOS VILLAGE The claim was paid by Farm Bureau Insurance. The claim was paid and the matter resolved approximately one year and nine months ago.

8. I was served with process in the within action whereupon

suit had been initiated. I called Mr. Carr during the twenty day period to find out what this action was and did not communicate wi him again until the day the judgment was filed. I discussed the case at length with Mr. Carr, counsel for the plaintiff, the day tl judgment was filed. I did not understand that a judgment would be entered against me, nor that I should take action to avoid judgment I received no other communication with plaintiff, Farm Bureau or Taylor Carr until such time as I was served with a motion for an order in supplemental proceedings.

9. I am not trained in the law nor have I ever been involve in litigation. I have not been required to use the services of counsel in any of my past business dealings or personal matters. Thus, I am not schooled in the rules of civil procedure, nor had I been aware of the requirements of law with respect to filing answer to complaints. I believed that I had fully responded to and addres the complaint of the plaintiff when I personally spoke with representatives of the plaintiff, attorney for the plaintiff, and Farm Bureau Insurance agents.

Further, affiant saith naught.

DATED this 11th day of December, 1987.

Dennis McDonald
DENNIS McDONALD
Defendant.

SUBSCRIBED AND SWORN to before me this 11th day of December, 1987.

Jackie J. Brady
NOTARY PUBLIC

My Comm. expires: 4/9/90 Residing at Pl. Grove, Utah

MAILING CERTIFICATE

I hereby certify that I mailed, postage prepaid, a copy of the foregoing instrument to Mr. Taylor D. Carr, Attorney for Plaintiff, at 350 South 400 East, Suite 114, Salt Lake City, UT 84111, this 11th day of December, 1987.

J. Brady

TAYLOR D. CARR - A0582
Attorney for Plaintiff
350 South 400 East, Suite 114
Salt Lake City, Utah 84111
Telephone (801) 363-0888

IN THE CIRCUIT COURT, STATE OF UTAH

UTAH COUNTY, PROVO DEPARTMENT

TIMPANOGAS VILLAGE, Plaintiff, vs. DENNIS MCDONALD dba MAC BUILDERS, Defendant.	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT Civil No. 873002481W

Plaintiff hereby sets forth the following Memorandum of Points and Authorities in response to defendant's Motion to set aside the Default Judgment in this matter.

FACTS

1. The defendant, Dennis McDonald dba Mac Builders, was personally served with a Summons and Complaint in this matter on September 19, 1987. (Record on file).

2. The defendant did not respond to said Summons and Complaint and a Judgment was taken on or about October 27, 1987, thirty eight (38) days after personal service was effected. (Record on file).

3. After said Judgment had already been taken the defendant called plaintiff's counsel concerning the Judgment and at that time stated that he was aware that he had been served but had forgotten about the matter because he was busy with

other business matters. (Affidavit of Taylor D. Carr attached hereto).

ARGUMENT

The defendant sets forth a lengthy statement of the facts of this case in order to show that he has a meritorious defense, however, it is clear pursuant to Rule 60(b) U.R.C.P. and applicable case law, that the defendant must show cause why the Default should be set aside before the defendant shows that he has a meritorious defense.

It has been clearly held that before the Court can decide whether the defendant has a meritorious defense the Trial Court must resolve the question of excusable neglect. State Department of Social Services vs. Musslman, 667 p. 2d 1053 (1983 Utah).

The defendant relies upon sub-paragraphs 1, 3 and 7 of Rule 60(b) U.R.C.P. in support of his contention that this Default should be set aside.

Rule 60(b)(3) concerns fraud or misrepresentation or other misconduct on the part of the adverse party and is clearly not supported by any facts in this case, and therefore will not be responded to.

Rule 60(b)(1) allows a Judgment to be set aside upon a showing of mistake, inadvertance, surprise or excusable neglect. There is a lengthy amount of case law as to what constitutes the elements of 60(b)(1) and it is clear that

the defendant cannot show any of these elements. The Utah Supreme Court has held for instance that illness alone is not sufficient to make neglect in defending one's action excusable. Warren vs. Dixon Ranch Company, 260 p. 2d 741. The Court has further stated even in a case where the plaintiff's attorney made an oral promise that the defendant could have more time to answer where the Default had already been entered that the Default would not be set aside because such was not sufficient excusable neglect so as to allow the vacation of the Default Judgment. Warren vs. Dixon Ranch Company, 260 p. 2d 741.

The defendant in this case has admitted that he received personal service of the Summons and Complaint but that he did not think he had to do anything about it. Although nowhere in his Affidavit does defendant say he was advised he did not have to file an answer. On the contrary, the evidence is that plaintiff always intended to pursue its claim and defendant knew this. (Affidavit of Taylor D. Carr with attachments). This is clearly not a sufficient standard to rise to the requirments of excusable neglect pursuant to Rule 60(b)(1) where the Court has repeatedly held that more than just forgetfulness, illness, business matters, or a feeling that nothing need be done must be shown in order to provide the excusable neglect required pursuant to that Rule.

The defendant also relies on Rule 60(b)(7), however,

sets forth no reason why this provision should apply, except that he is not trained in the law. A similar case is that of Granite School District vs. Cox, 506 p. 2d 806, where the defendant's excuse for setting aside the Default was that he thought the Summons was invalid and therefore paid no attention to it. The Court refused to set aside the Default on that basis.

CONCLUSION

Based upon the above cited facts, the attached Affidavit and the law cited herein plaintiff respectfully requests that the Court deny defendant's Motion to set aside the Default in this matter.

DATED and SIGNED this 15th day of December, 1987.

TAYLOR D. CARR
Attorney for Plaintiff

MAILING CERTIFICATE

I hereby certify that I caused a true and correct copy of the above and foregoing document to be mailed, postage prepaid, this 15th day of December, 1987, to:

Gary H. Weight
P.O. Box "L"
Provo, Utah 84603

BARBARA PARRY
Secretary

TAYLOR D. CARR - A0582
Attorney for Plaintiff
350 South 400 East, Suite 114
Salt Lake City, Utah 84111
Telephone (801) 363-0888

IN THE CIRCUIT COURT, STATE OF UTAH

UTAH COUNTY, PROVO DEPARTMENT

TIMPANOGAS VILLAGE, Plaintiff, vs. DENNIS MCDONALD dba MAC BUILDERS, Defendant.	AFFIDAVIT OF TAYLOR D. CARR Civil No. 873002481CV

STATE OF UTAH)
: ss
COUNTY OF SALT LAKE)

Your affiant, Taylor D. Carr, upon being duly sworn, deposes and states as follows:

1. He is attorney for Plaintiff in the above entitled matter and is personally familiar with the facts set forth herein below.

2. Contrary to defendant's Affidavit this matter was not resolved one year and nine months ago. Defendant was put on notice May 16, 1986 and again on September 3, 1986, that he was expected to pay or legal proceedings would be initiated. (Two letters from Utah Farm Bureau attached).

3. On or about September 19, 1987 your affiant caused to be served through a constable in Utah County, a Summons and Complaint which was personally served upon the defendant herein.

4. Contrary to the statement made by defendant, defendant never contacted your affiant until after the Default was entered. However, accepting defendant's statement that such contact was made, nowhere in defendant's Affidavit does he say he was advised he did not have to file an answer.

5. Approximately thirty eight (38) days after service of process your affiant caused to be entered a Default Judgment for lack of response to said Summons and Complaint from defendant.

6. After the time said Default was entered your affiant had a personal telephone conversation with the defendant in this matter wherein the defendant stated that he knew he had been served and that he had forgotten about the matter because of other business affairs and that he had not remembered about the case until after the Default had been entered.

DATED and SIGNED this 15th day of December, 1987.

TAYLOR D. CARR
Attorney for Plaintiff

NOTARY CLAUSE

SUBSCRIBED and SWORN to me this 15th day of December, 1987.

NOTARY PUBLIC
BARBARA K. BARRY
STATE OF UTAH

Barbara K. Barry
NOTARY PUBLIC

My Commission Expires:
10-5-91

Residing in: Salt Lake County, Utah

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing document, postage prepaid this 15th day of December, 1987, to:

Gary H. Weight
P.O. Box "L"
Provo, Utah 84603

Barbara Parry
BARBARA PARRY
Secretary

May 16, 1986

Mac Builders and Remodeling Company
Attention: Dennis McDonald
627 West 1700 North
Orem, Utah 84057

RE: Our Insured: Timpanogas Village Medical Association
Our Policy: #1700221
Date of Loss: 02-09-86

Dear Mr. McDonald:

As a result of my investigation of this claim, it is my belief that your company is responsible for the damage sustained by our insured.

Failure of your employee to properly insulate a water line he installed, which subsequently froze and burst and caused damage to our insured's property, has led me to this belief.

Utah Farm Bureau Insurance Company has paid $3,929.46 to our insured as a result of this claim. In addition, our insured has paid a $100.00 deductible.

I recommend that you forward this letter to your liability insurance carrier. Further questions or comments concerning our subrogation claim should be directed to Mr. Jerry Schaaf at our Murray office. The phone there is #261-2424.

Sincerely,

R. L. Harmon
Senior Claims Adjuster

RLH/ba

September 3, 1986

Mac Builders and Remodeling Company
Attention: Dennis McDonald
627 West 1700 North
Orem, Utah 84057

RE: Our Insured: Timpanogas Village Association
Our Claim: #1700221
Date of Loss: 02/09/86

Dear Mr. McDonald:

I am following up to a letter dated May 16, 1986 wherein our adjuster, Bob Harmon, had asked that you forward his subrogation demand on your liability insurance carrier for consideration. I have not heard either from you or from your liability carrier since that date. As you are aware, it is our contention that the water line which burst and caused water to escape from that line was improperly placed in the ceiling area by one of your subcontractors. I know that you are familiar with the allegations that we are making and with the negligence that we are charging you with. You have previously indicated to Bob Harmon that you had warned our insureds to cover this particular pipe with insulation, however, in a statement that we have taken from our insureds, they indicated that they were not even aware that the pipe was in that location. We feel as the contractor in doing the remodeling you should have provided proper insulation in covering that pipe so that such an incident (freezing of the pipe and subsequent water damage) would not happen. We feel that the responsibility was yours and that the responsibility was breeched causing these damages, and therefore again we are making a formal demand of you in the amount of $3,929.46 which we have paid as a result of this claim, as well as our insured's $100 deductible bring the total claim to $4,029.46.

As this is our second demand, I am asking that you make arrangements for restitution within the next ten days or provide us with the name of your insurance carrier so that we might carry out a correspondence with them. If you fail to do so, I will assume that you are denying responsibility for the damages and will have no alternative but to turn the matter over to our attorneys for futher legal proceedings against you in this regard.

Should you have any questions, please feel free to contact me.

Sincerely,

Jerry Schaaf
Claims Supervisor

JS/js

3-4

CIRCUIT COURT, STATE OF UTAH

UTAH COUNTY, PROVO DEPARTMENT

TIMPANOGOS VILLAGE Plaintiff, -vs- DENNIS McDONALD dba MAC BUILDERS Defendant.	MINUTE ENTRY Dated January 19, 1988 Case No. 873002481 CV Judge Joseph Dimick

After considering Defendant's Motion to Set Aside Default Judgment, the same is hereby denied.

Judge Joseph Dimick

Mailed copy to:

Taylor D. Carr, 350 S. 400 E., Suite 114, SLC, UT 84111
Gary H. Weight, P.O. Box "L", Provo, UT 84603

Mailed by: Judy Talbot